Filed 4/23/12 Cal-OSHA v. Superior Court CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STATE OF CALIFORNIA DIVISION OF OCCUPATIONAL SAFETY AND HEALTH et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; MARGARITA ALVAREZ BAUTISTA et al., Real Parties in Interest.	B235419 (Los Angeles County Super. Ct. No. BC418871)

PETITION for writ of mandate. Teresa Sanchez-Gordon, Judge. Petition granted.

Department of Industrial Relations, Office of the Director-Legal Unit, Vanessa L. Holton, Frank Nelson Adkins, Anthony Mischel; Hanson Bridgett, Kimon Manolius, Joseph M. Quinn, Julia H. Veit, Adam W. Hofmann; Division of Occupational Safety and Health, Amy Martin and William Nguyen for Petitioners.

No appearance for Respondent.

Munger, Tolles & Olson, Bradley S. Phillips, Stuart N. Senator, Benjamin J. Maro; Public Counsel Law Center, Catherine Lhamon, Maureen Carroll; ACLU Foundation of San Diego & Imperial Counties, David Blair-Loy; American Civil Liberties Union of Southern California and Mark D. Rosenbaum for Real Parties in Interest.

In this writ petition, the State of California Division of Occupational Safety and Health (Cal-OSHA) seeks reversal of a discovery order granting the additional disclosure of approximately 2,200 files, consisting of more than 200,000 additional pages of records related to enforcement of the heat illness prevention regulation (Cal. Code Regs., tit. 8, § 3395) from 2005 through 2008, and 2010. The operative first amended complaint alleged the agency's failure to enforce the heat illness prevention regulation and attached as exhibits complaints submitted to the agency in 2009. Cal-OSHA has produced those files, along with all the 2009 files, totaling 1,100 files and 100,000 pages of records. Real parties in interest (hereafter, Bautista)[1] seek additional discovery to establish a "pattern and practice" of lack of enforcement. We must determine whether Bautista may obtain through discovery the additional files that pre- and post-date the filing of the initial complaint in this traditional mandamus proceeding in the superior court.

While the Civil Discovery Act (Code Civ. Proc., § 2016.010) (the Act) applies to traditional mandamus proceedings brought under Code of Civil Procedure section 1085 (Code Civ. Proc., § 2016.020, subd. (a)), common law principles limit the admission of evidence unless the facts are in dispute. This action arises from disputed facts related to the agency's 2009 enforcement activities. Thus, we conclude the trial court's discovery order compelling Cal-OSHA to produce files before and after 2009 is inconsistent with the common law principles governing traditional mandamus proceedings in superior court. We grant the petition.

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[1] Real parties in interest are plaintiffs Margarita Alvarez Bautista, Ana Rosa Bautista, Socorro Rivera, Mauricia Calvillo, Natividad Carrillo, and the United Farm Workers of America.

BACKGROUND

The operative first amended complaint (complaint) alleged three causes of action, including the two remaining causes of action seeking a writ of mandate pursuant to Code of Civil Procedure section 1085 and Labor Code section 6327.5.[2] These causes of action seek a mandate to compel Cal-OSHA and its director to perform its ministerial duties under several provisions of the Labor Code contained in the California Occupational Health and Safety Act (Lab. Code, § 6300 et seq.).[3] While the complaint referred to incidents of heat-related illnesses and deaths, these remaining causes of action did not allege specific facts related to failure to enforce the heat illness prevention regulation. Instead, the complaint attached declarations in which the declarant stated that he or she had complained to Cal-OSHA regarding a heat-related incident involving farm workers. The complaint also alleged, pursuant to Labor Code section 6327.5,[4] the director and the

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[2] In *Bautista v. State of California* (2011) 201 Cal.App.4th 716, we affirmed the trial court's order sustaining a demurrer to the first cause of action.

[3] The causes of action seeking a writ of mandate allege Cal-OSHA has various duties set forth in the Labor Code related to enforcement activities, including Labor Code sections 6300 (Purpose of California Occupation Safety and Health Act of 1973); 6309 (Investigations; response to complaints; protection of complainants); 6313 (Investigation of industrial accidents, serious exposures, or occupational illnesses; corrective orders); 6317 (Citation or notice, abatement; civil penalties; limitations; records); 6320 (Reinspection); 6321 (Advance notice of inspection or investigation; offense). Bautista also alleges duties arising from assessing and collecting civil penalties, including Labor Code sections 6428 (Serious violation; civil penalty); 6429 (Willful or repeated violations; civil penalties); 6430 (Failure to correct violation in time; civil penalty); and 6651 (Limitations of actions to collect any civil penalty).

[4] Labor Code section 6327.5 states in relevant part: "If the division arbitrarily or capriciously fails to take action to prevent or prohibit any conditions or practices in any employment or place of employment which are such that danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through other available means, any employee who may be injured by reason of such failure, or the representatives of such employees, may bring an action against the chief of the division in any appropriate court for a writ of mandate to compel the division to prevent or prohibit the condition."

agency arbitrarily and capriciously failed to take action to prevent or prohibit a dangerous condition in the workplace.

DISCOVERY ORDER

1. *Bautista's Initial Demand for Documents*

Bautista sought information regarding the enforcement of the heat illness prevention regulation dating back to is implementation in 2005. Specifically, Bautista demanded: (1) all complaints alleging heat-related violations; (2) all investigative materials; (3) all employer responses; (4) all enforcement materials; (5) all appeal materials; (6) evidence and briefs presented during the appeals process; and (7) all documents showing the penalties imposed and paid.

Bautista also sought additional documents related to reported heat dangers by or on behalf of agricultural workers, and any heat-related incident dating back to 2000.

Cal-OSHA moved for a protective order, contending that Bautista's discovery was unduly burdensome. Cal-OSHA submitted a declaration estimating that it would take approximately 2,000 employee hours at a cost to taxpayers in excess of $116,000 to respond to the discovery.

The trial court denied the motion for protective order.

2. *The Parties' Agreement to Limit Discovery to 2009 Files*

Cal-OSHA made two proposals in a letter to Bautista's counsel to ease the burden of responding to the discovery, which required Bautista to share the expense of production. The trial court, however, addressed these proposals during a case management conference, stating: "We've already said even before this letter was shown to the court that it would start in August 2005."

In September 2010, after producing most of the 2009 files, Cal-OSHA proposed that Bautista review the 2009 files before the agency produced the additional files. Cal-OSHA's counsel stated: "If it [2009] does [show violations], then it's a moot point and I understand under the Salmon case and others, we would be looking for pattern and practice. [¶] If 2009 does not [show violations], it would seem to be a fishing expedition if you weigh out the balancing of interests . . . I think the balance of interests would shift

if 2009 showed no violations." The trial court stated: "[i]f you get to 2009 and there's nothing there and you're thinking about resources spent and you continue to talk and confer with plaintiff's counsel and you reach an agreement, I'm good with that."

Cal-OSHA produced 1,100 files from 2009. The agency significantly underestimated the number of hours it would take to produce the documents. Attorneys spent 865.2 hours and paralegals spent an additional 174 hours to produce the 2009 files.

3. *Bautista's Motion to Compel*

Following the production of the 2009 files, Bautista renewed the demand for the additional files and also propounded a request for 2010 files. Bautista maintained the 2009 files showed Cal-OSHA failed to perform its ministerial duties as set forth in the Labor Code to enforce the heat illness prevention regulation, entitling them to the additional discovery under the terms of their agreement.

Bautista moved to compel production, contending the 2005 through 2008 files were relevant to show a "longstanding pattern and practice of violating its mandatory duty to enforce California's heat illness prevention regulation." The 2010 files also were relevant and necessary to show a continued "pattern and practice."[5]

Cal-OSHA opposed Bautista's motion to compel, contending that these additional files were not relevant, and the expense of producing these files to taxpayers made the discovery demand unduly burdensome. The agency submitted a declaration estimating that it would require an additional 2,070 hours, or roughly 52 weeks of work by one attorney, to comply with the discovery request.

The trial court granted Bautista's motion to compel. Cal-OSHA has asked this court to intervene to vacate the discovery order. After reviewing the writ petition, preliminary opposition, and reply, we issued an order to show cause why the requested

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[5] Cal-OSHA maintains that this discovery dispute represents a much larger disagreement between the parties related to how the mandamus claims should be adjudicated. Cal-OSHA moved for clarification of these proceedings in the superior court, but the court declined to rule on the motion. Cal-OSHA contends that had the superior court ruled on the motion (and narrowed the proceedings), it would not have granted Bautista's broad discovery request.

relief should not be granted, asked for further briefing from the parties, and set the matter for oral argument to address the discovery order. We granted a stay pending our resolution of the petition.

DISCUSSION

Writ review of discovery orders is limited, but this case presents an issue of general importance to the trial courts and to the profession. (*Perlan Therapeutics, Inc. v. Superior Court* (2009) 178 Cal.App.4th 1333, 1342.)

1. *Discovery in Mandamus Proceedings in the Superior Court Compelling the Performance of a Ministerial Duty is Limited by Western States*

Cal-OSHA contends that discovery is limited in traditional mandamus proceedings in superior court to the record, and extra-record evidence is generally not admissible. This begs the question: "What is the record in a traditional mandamus proceeding in the superior court challenging the failure to perform a ministerial duty?" Since this is not a quasi-legislative action or agency adjudicatory decision, there is no administrative record. Thus, we do not apply the broad rule Cal-OSHA cites related to administrative records. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 575-576) (*Western States*).[6]

When superior courts are asked to review ministerial actions in a traditional mandamus proceeding, evidence beyond the verified petition is usually necessary because there is often no record in such cases. (See *Western States, supra*, 9 Cal.4th at p. 575.) While sometimes referred to as "extra-record" evidence, the evidence is actually

[6] Cal-OSHA cites to several cases discussing the record in superior court writ proceedings in which the challenge arises from proceedings before a government or private body, in which the participants present evidence and testimony. These cases are inapposite because Bautista is not challenging an adjudicatory or quasi-legislative administrative decision. Cal-OSHA's citation to a leading treatise provides guidance related to the preparation of the record depending upon the nature of the writ proceeding in the superior court. (Cal. Civil Writ Practice (Cont.Ed.Bar 4th ed. 2011) §§ 7.2–7.12, pp. 165-172.1.)

the documentary record to support the disputed facts asserted in the petition to obtain a writ of mandate. (Cal. Civil Writ Practice, *supra*, § 7.11, p. 171.)

Cal-OSHA now refers to the 2009 files already produced as the "record" in the superior court writ proceedings. The agency's contention is anything outside the 2009 period is "extra-record" evidence and inadmissible under *Western States*, *supra*, 9 Cal.4th 559, because it is not relevant to any disputed facts in the superior court writ proceedings.

The right to discovery in a traditional mandamus proceeding challenging a ministerial action is guided by both statutory and common law principles. Under the Code of Civil Procedure, special proceedings of a civil nature, such as writs of mandamus, are governed by the Act. (See Code Civ. Proc., §§ 2016.20, subd. (a), 2017.010.) But, *Western States* limits the civil discovery rule that any party may obtain discovery that is relevant to the subject matter involved in the pending action if the matter either is itself admissible or appears reasonably calculated to lead to the admissible evidence. (See Code Civ. Proc., § 2017.010) "Extra-record" evidence in traditional mandamus actions challenging ministerial actions is admissible only if the facts are in dispute. (*Western States*, at pp. 575-576.) Thus, applying *Western States*, Bautista is only entitled to discovery of Cal-OSHA's 2009 files.

2. *Bautista May Not Obtain Discovery of Historical Enforcement Activity in this Mandamus Proceeding to Compel Performance of a Present Ministerial Duty*

An action in traditional mandamus challenging ministerial actions (Code Civ. Proc., § 1085, subd. (a)), is proper when, as here, the claim is that an agency has failed to act as required by law. (*Conlan v. Bonta´* (2002) 102 Cal.App.4th 745, 752.) To obtain relief, Bautista has the burden of proof to show a clear, present and usually ministerial duty on the part of Cal-OSHA, and a clear, present and beneficial right in Bautista to the performance of that duty. (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1154; *Conlan v. Bonta´*, at p. 752.) Bautista's right and Cal-OSHA's ministerial duty are measured as of the time the proceeding is filed. (*Lundgren v. Deukmejian* (1988) 45 Cal.3d 727, 732.) Thus, Bautista must show

that Cal-OSHA failed to perform a ministerial duty in 2009, at the time the initial complaint was filed.

Cal-OSHA has produced all the 2009 files that relate to the disputed facts alleged in the complaint seeking mandamus relief. Bautista presents several arguments as to the right to discovery of the additional historical files. None has merit.

Bautista contends the additional historical files (2005-2008) may be obtained in discovery because these files relate to Cal-OSHA's failure to perform duties that arose in 2009, including commencement of an action to collect fines (Lab. Code, § 6651) and assessment of civil penalties against employers who fail to correct a violation (Lab. Code, § 6430). For this limited purpose, Bautista's discovery request is overbroad.

Bautista is not seeking retroactive relief, but next contends the right to discovery of the historical files is necessary to show Cal-OSHA has a "pattern and practice" of failing to perform its ministerial duty to enforce the heat illness prevention regulation. Even if the complaint alleged prior lack of enforcement, the disputed factual issue for which mandamus will lie relates to the agency's failure to perform its ministerial duties in 2009.

Bautista's mandamus claims relate to how Cal-OSHA handled individual complaints during 2009, not a "practice" or a de facto policy by the agency. Bautista's own cases illustrate this distinction. In *Conlan v. Bonta´*, *supra*, 102 Cal.App.4th 745, the Department of Health Services' "practice" was its failure to implement a procedure for direct reimbursement of amounts owed recipients for covered services obtained prior to acceptance into the Medi-Cal program. (*Id*. at pp. 749-752, 763-764.) *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1559 and *Californians for Native Salmon etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1428-1429, unlike here, challenged an ongoing de facto policy and, in the *Salmon* case, the association sought declaratory relief because the agency allegedly had a policy of violating applicable law. *Knoff v. City etc. of San Francisco* (1969) 1 Cal.App.3d 184, involved the assessor's criminal wrongdoing, resulting in a "wholesale" refusal to follow his public duties, and a writ issued mandating that the affected public officers examine

past assessments and adjust them to the extent possible. (*Id.* at pp. 194-197.) None of these cases sought a mandate based upon a case-by-case failure to perform a ministerial duty.

We also reject Bautista's argument that the historical files are admissible to show that 2009 was an exceptional year for enforcement of the heat illness prevention regulation. This is contrary to the position advanced in the superior court that led to the broad discovery order.

In sum, under *Western States*, Bautista's right to discovery is limited to the 2009 files because the enforcement activity in 2009 is the disputed factual issue in the superior court writ proceeding. Whatever minimal value the 2005 through 2008 files have must be considered along with the significant cost to the state to respond to this discovery. Even though the trial court weighed these factors on two separate occasions, it appears to have done so without consideration of the *Western States* limits. Thus, the trial court erred in granting the motion to compel. We therefore grant the relief sought in the petition with respect to the 2005 through 2008 files.

3. *Bautista May Not Obtain Discovery of the 2010 Files*

Applying *Western States*, Bautista may not obtain discovery of the 2010 files because those files are extra-record evidence and are not disputed factual issues in the superior court writ proceedings.

Relying on *Bruce v. Gregory* (1967) 65 Cal.2d 666, 670-671, and *State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 742, Cal-OSHA contends it is entitled to introduce into evidence the 2010 files in the superior court writ proceedings to show additional facts that might render the request for mandate moot or make the remedy useless. (*Bruce v. Gregory*, at p. 670.) At oral argument, Cal-OSHA's counsel repeated that assertion. If Cal-OSHA intends to introduce the 2010 files, or any subsequent files to dispute the facts raised in the superior court writ proceedings, we leave it up to the trial court to determine Bautista's right to additional discovery under *Western States*.

DISPOSITION

The relief sought in the petition for writ of mandamus or other appropriate relief is granted. Let a peremptory writ of mandate issue directing the trial court to vacate its discovery order of June 27, 2011, consistent with the decision of this court. The previously ordered stay is hereby dissolved. Cal-OSHA is entitled to costs in this proceeding.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.